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In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL A. ORBEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

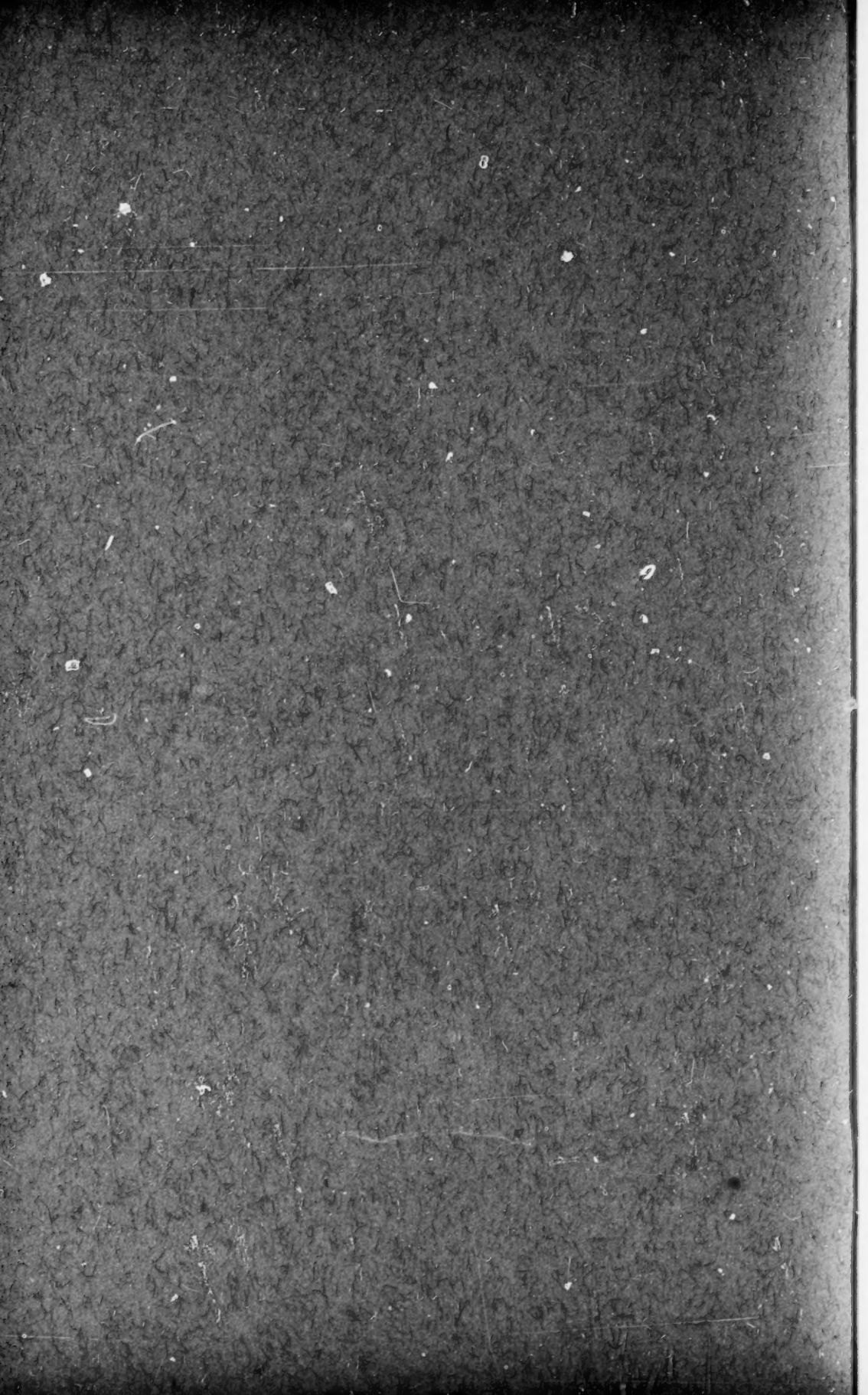
BRIEF FOR THE UNITED STATES
IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, for engaging in indecent acts with minors.



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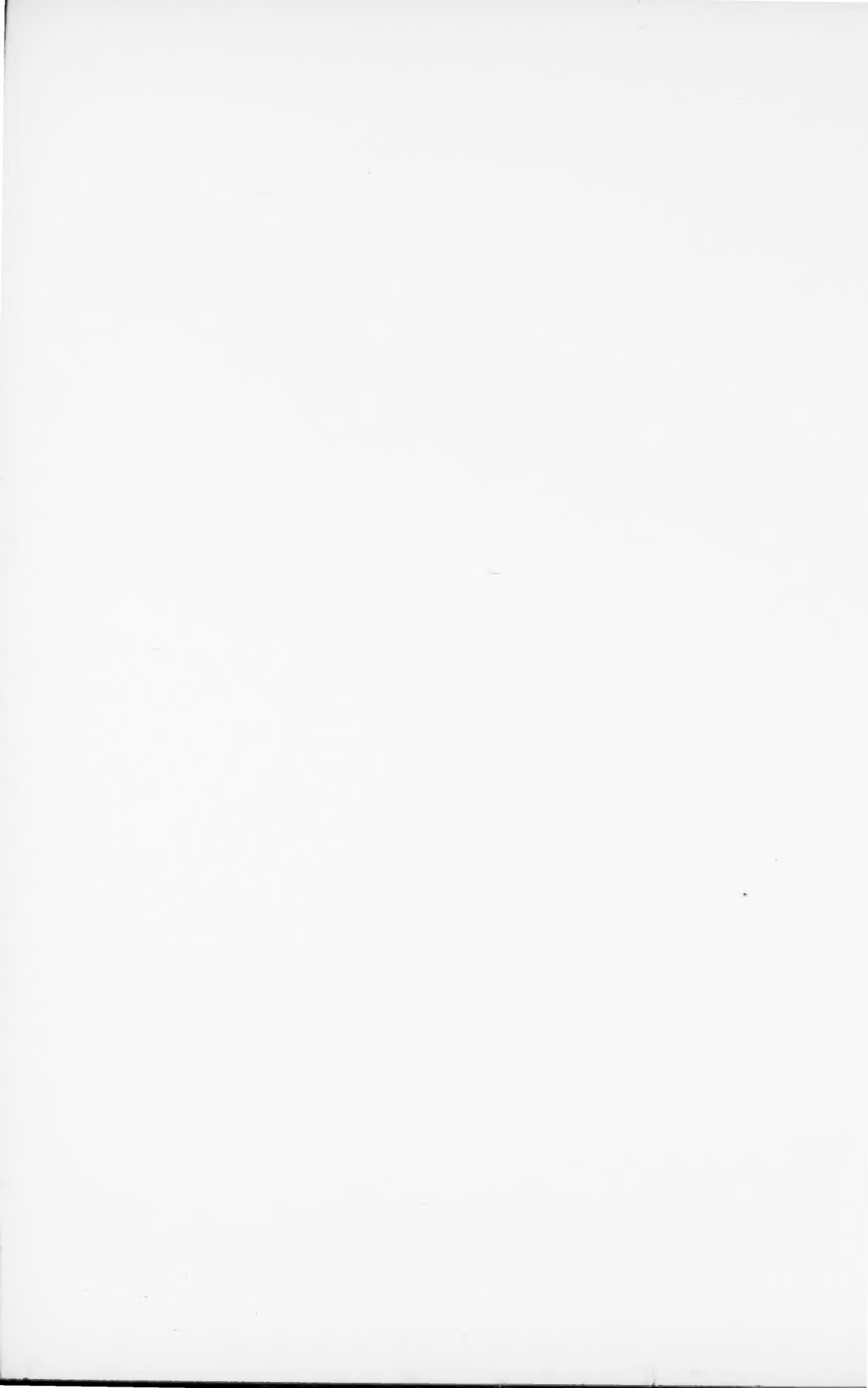
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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-15a) is reported at 28 M.J. 172. The opinion of the Air Force Court of Military Review (Pet. App. 16a-21a) is unreported. The findings of the trial judge (Pet. App. 11a-15a) are reprinted in the opinion of the Court of Military Appeals.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 5, 1989. The petition for a writ of certiorari was filed on August 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial before a military judge at Grand Forks Air Force Base, North Dakota, petitioner, a member of the United States Air Force, was convicted of various types of indecent conduct in four separate specifications involving three different boys under the age of 16, all in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934 and para. 87, *Manual for Courts-Martial, United States—1984 (Manual)* IV-129.¹ He was sentenced to confinement for one year, a dishonorable discharge, total forfeiture of pay and allowances, and a reduction in rank.² The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Petitioner was stationed at Grand Forks Air Force Base in North Dakota beginning in July 1985. PX 1. By mid-September of 1985, petitioner had befriended three

¹ Article 134 of the UCMJ is known as the General Article. It punishes three categories of crimes—termed Clause 1, Clause 2, and Clause 3 offenses—that are not expressly defined by other, more specific provisions of the Code. Clause 1 punishes “disorders and neglects to the prejudice of good order and discipline in the armed forces”; Clause 2 punishes “conduct of a nature to bring discredit upon the armed forces”; and Clause 3 punishes crimes in violation of federal laws applicable to civilians. Para. 60(c), *Manual* IV-109 to IV-110. Paragraphs 61-113 of the *Manual* flesh out the conduct that violates Clauses 1 and 2 by defining specific offenses under Article 134. See *Manual* IV-111 to IV-147. Paragraph 87, of which petitioner was convicted, makes it a crime to commit indecent acts or to take indecent liberties with a child. *Id.* IV-129. See also *id.* paras. 89c, 90c, *Manual* IV-131 (defining the term “indecent”).

² Petitioner was acquitted on the charge of engaging in sodomy with a child under the age of 16.

dependent sons of military members assigned to the base. All three boys were under the age of 16.

Petitioner became acquainted with all three boys at the video arcade section of the base bowling alley. Tr. 37-38, 186-187, 190, 250-251. Under the guise of friendship, petitioner took the boys on outings to movies, stores, and restaurants. Tr. 40, 41, 57, 60, 194-197. During these outings, petitioner engaged in the conduct for which he was convicted.³ One of the four specifications charged petitioner with committing indecent acts with Eric Hricak by showing Eric several magazines that contained pictures depicting full body nudity of adults and children with the intent to arouse Eric and himself sexually. That specification stemmed from the following facts:

Eric was 12 years old when he met petitioner at the video arcade in July 1985. Tr. 250-251. Petitioner took Eric to the base movie theater a few times before school began in late August or early September 1985. Tr. 254. On a later occasion, petitioner took Eric to a video arcade at a local shopping mall off-base. Tr. 257. While the two were in petitioner's car, petitioner placed his hand on Eric's inner thigh three times, but each time Eric pushed petitioner's hand away. Tr. 258, 272. On a separate occasion in the parking lot of the base bowling alley, Eric and a friend sat with petitioner in his car. Petitioner produced a copy of *Playboy* magazine, opened it, and showed it to them. Eric

³ Besides the conduct involving Eric Hricak, petitioner's conduct included placing his hands on the legs, inner thighs, and crotch of a second boy, Thomas Thorp, as well as kissing Thorp on the mouth. Tr. 47-48, 53-61, 76, 79-80. Petitioner also once placed his hand on the inner thigh of a third boy, Mario Perez. Tr. 203. Petitioner also told Perez about "two guys in prison screwing each other." Petitioner told Perez that "there is no difference between a woman's vagina and a man's butt," and that "if [Perez] was in prison for three years, around a bunch of men, [he would] screw a man, too." Tr. 191, 192, 203.

testified that he saw pictures of a woman nude from the waist up. Tr. 260. On another occasion, Eric was alone with petitioner in his car. While leaving the bowling alley, petitioner produced a magazine that he said was German, opened it, and gave it to Eric. Tr. 262. Eric saw "kids standing there naked," who appeared younger than he was and whose genitals were fully displayed. Tr. 262-263. Eric returned the magazine to petitioner, who said that "this was all right in Germany" and "you can get these everywhere." Tr. 264.⁴

2. The Air Force Court of Military Review affirmed. Pet. App. 16a-21a. The court rejected petitioner's claim that displaying nonpornographic materials to Eric did not constitute taking indecent liberties with a minor, in violation of Art. 134, UCMJ, 10 U.S.C. 934. The court agreed that displaying such pictures themselves would not violate Article 134, but it concluded that "it was the obvious intended purpose of [petitioner] for showing these publications to the victim that makes his conduct criminal." Pet. App. 20a. The court therefore concluded

⁴ Petitioner also showed magazines containing pictures of nude people to both Thomas Thorp and Mario Perez. Tr. 43, 45, 205-208. On a trip to a movie theater, petitioner produced what Thomas Thorp described as "dirty" magazines containing totally nude pictures of people that appeared to Thomas to be between the ages of 15 and 30. Tr. 45-46. Petitioner said that the magazines came from Europe. Tr. 46. On the return trip after the movie, petitioner twice grabbed Thomas' inner thigh. Tr. 47-48. Mario Perez testified about a trip in which petitioner produced three magazines. Tr. 205-208. On the cover of one, Mario saw a naked boy who appeared to be 10-12 years old; he said that the boy in the picture did not have much pubic hair. Tr. 206. In looking through the magazine, Mario saw several naked people whom he described as being "[f]rom [a] very young to about my age and older." Tr. 206.1. By "very young," Mario explained some were "from about 3 to 5" years old. *Ibid.* About half of the pictures he saw were of males and the other half were of females. Tr. 207.

that, under the totality of the circumstances, displaying the magazines to Eric violated Article 134. *Ibid.*

3. The Court of Military Appeals affirmed. Pet. App. 1a-15a. It rejected petitioner's claims that displaying the magazines did not violate Article 134 and that his conduct was protected by the First Amendment. The court held that displaying nonpornographic magazines to a minor is prohibited by the UCMJ when it is done with the intent to arouse a minor or the service member sexually. Pet. App. 6a. The court rejected petitioner's First Amendment claim, on the ground that the government can afford greater protection to minors than adults from sexually oriented materials. *Id.* at 6a-7a.

ARGUMENT

Petitioner contends that the military courts erred in ruling that his conduct violated Article 134 of the UCMJ, 10 U.S.C. 934, and was not protected under the First Amendment. That claim does not warrant review by this Court.

1. To begin with, a decision in petitioner's favor would not require that his conviction be set aside. Petitioner was convicted on four different specifications of violating Article 134, see Pet. App. 2a (describing each specification), and he does not challenge his conviction on three of those specifications (1, 2, and 4). His failure to do so is significant because it is well settled under military law that a serviceman is guilty of a charge if he is convicted of any supporting specification. Since petitioner does not challenge his convictions on the other three specifications, a ruling in his favor on the question he presents in the petition would not require his conviction to be set aside.⁵ In light of the conduct proven in the other specifications, it

⁵ Under military law, a "charge" is different from a "specification." A "charge" identifies the specific UCMJ Article that the accused is

is also highly unlikely that reversing petitioner's conviction on specification 3 would lead to a reduction in his sentence. Under these circumstances, the question in the petition raises only an abstract issue of no practical importance to this case.

2. On the merits, petitioner argues that the military courts improperly expanded the scope of Article 134 of the UCMJ to include the display of nonpornographic material to a minor and, in so doing, have given that provision such an expansive construction that it violates the First Amendment. Petitioner, however, has misread the decisions below.

The military courts did not hold that the act of displaying a nonpornographic magazine to a minor by itself was prohibited by Article 134 and Paragraph 87 of the *Manual*. Both military appellate courts made clear that petitioner's actions were prohibited only because of his intent. Pet. App. 5a-6a, 20a.⁶ That ruling is consistent with

alleged to have violated. Rule for Courts-Martial 307(c)(2), *Manual* II-29. By contrast, a "specification" is "a plain, concise, and definite statement of the essential facts constituting the offense charged." Rule for Courts-Martial 307(c)(3), *Manual* II-29. When a defendant is alleged to have committed more than one infraction of the same Article, there will be only one charge, but there will be several specifications thereunder. Discussion to Rule for Courts-Martial 307(c)(2), *Manual* II-29. Accordingly, a military defendant can be found guilty of a charge as long as he is found guilty of one specification and even if he is acquitted of the remaining specifications. Discussion to Rule for Courts-Martial 918(a)(2), *Manual* II-133 ("Where there are two or more specifications under one charge, conviction of any of those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of not guilty as to the other specifications do not affect that charge.").

⁶ The Court of Military Appeals had previously ruled that the offense of taking indecent liberties with a minor does not require proof that the minor was physically touched. *United States v. Scott*, 21 M.J.

earlier military case law recognizing that the circumstances accompanying a servicemember's acts must be considered in determining whether those acts are indecent.⁷ In this case, petitioner's act of displaying to a 12-year-old boy magazines containing nude pictures of an adult woman and minors was part of a course of conduct in which petitioner had sought physically to molest Eric and had been stopped only by Eric's disapproval. Accordingly, specification 3 charged, and the evidence showed, that petitioner did not display the magazines to Eric to "educate" Eric about sex; rather, he used the magazines in an effort to arouse Eric and himself sexually. Conduct designed to arouse a minor sexually as part of a course of conduct involving physical molestation is not protected by the First Amendment and can be punished under Article 134 of the UCMJ.

345, 348 (C.M.A. 1986); *United States v. Brown*, 3 C.M.A. 454, 13 C.M.R. 10 (1953). See Pet. App. 5a. Petitioner does not challenge that ruling in this Court.

⁷ See *United States v. Wilson*, 13 M.J. 247, 250 (C.M.A. 1982) ("acts not inherently indecent, lewd, or lascivious may be rendered so by the accompanying words and circumstances"); *United States v. Drake*, 26 M.J. 553, 554-555 (A.C.M.R. 1988) ("the indecency is related more to the circumstances surrounding the act than the act itself").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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